EVAN GOYKE
STATE REPRESENTATIVE
18th ASSEMBLY DISTRICT

To: Wisconsin State Legislature
From: State Representative Evan Goyke
Date: Monday, June 17th, 2013
Re: Constitutional Problems with DNA Collection as amended in AB 40

Dear Fellow Legislator,

Below are my personal legal opinions after reviewing the language that we are scheduled to debate this week regarding the warrantless collection of DNA upon arrest as proposed in the Substitute Amendment to AB 40 compared to the recent United State Supreme Court decision in Maryland v. King, which upheld Maryland's DNA collection statute. There are significant differences between Wisconsin's proposed DNA collection law and Maryland's, which, in my opinion, raise serious legal questions. Several legislators on both sides of the aisle have rightly questioned the wisdom of this proposal – a group that I join.

This memorandum describes the Maryland statute, Wisconsin's warrantless DNA collection law as proposed in the Substitute Amendment to AB 40, and a comparison of the two.

Wisconsin's Proposed DNA Collection Law

As amended, AB 40 would allow Wisconsin law enforcement officials to collect DNA samples from adults and juveniles upon a felony arrest, but would not allow processing of the sample unless the arrest was made pursuant to a warrant, a judicial finding of probable cause has taken place, or the defendant fails to appear for court. If the case proceeds, the court has the affirmative duty to inform the defendant of his or her right (and obligation) of seeking the expungement of the sample if the charges are dismissed, reversed, vacated, reduced, or if no charges are filed within one year of collecting the sample. The proposal also calls for the collection of DNA for those guilty of all misdemeanors upon conviction.

Maryland's DNA Collection Law

Maryland's DNA Collection law allows collection upon arrest of an individual charged with a violent crime or burglary, or attempt to commit such a crime. The DNA sample may not be tested or placed in the statewide DNA database prior to the first arraignment date unless done so with consent of the individual. The DNA must be destroyed if the individual is not convicted; if the conviction is reversed or vacated and no new trial is permitted; or if an unconditional pardon is granted. DNA may only be obtained through a bucal swab of the arrestee's saliva, is limited and may not be used for any other purpose than establishing the arrestee's identification.

Important Differences between Maryland and Wisconsin

There are several differences between Wisconsin's proposed warrantless DNA collection and Maryland's. These differences will almost ensure a challenge in Wisconsin State court and may result in the opposite result reached in King. Importantly, Wisconsin's DNA collection applies to a much wider population by not limiting collection to violent crimes or burglary. While this expansion may not have constitutional significance, it is much more expensive and applies to a substantially larger population, magnifying the problems below.

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First, Wisconsin's DNA collection clearly applies to juveniles. The King decision did not address this, though there has been a substantial trend in recognizing added protections for juveniles in the criminal justice system. A future court may view the collection of DNA from a 13 year old different than from a 30 year old. There are also added protections of juveniles' records and identification that are not addressed by Wisconsin's proposal.

Second, Wisconsin's proposal does not require expungement of the sample upon a showing of innocence. In Maryland, the state bears an affirmative duty to clear the innocent person's sample and to notify the person of the sample's destruction. Wisconsin's law fails to protect the innocent arrestee and rather places the burden of expungement on the individual.

Third, Wisconsin's proposal allows law enforcement to use "reasonable force" to obtain the DNA sample if the arrestee "intentionally refuses" to provide a sample.

Fourth, Wisconsin's provision allows DNA collected at arrest to be used in a later prosecution even if the DNA was collected in error or should have been removed from the database. Wisconsin's proposal strips a defendant of the ability to challenge the later admissibility of the DNA even in the event of erroneous collection.

These differences are not small and may impact Wisconsin Courts' interpretation of the warrantless collection of DNA upon arrest in light of the King decision. Undoubtedly, challenges will be made and undoubtedly these differences will be argued as a basis for a Wisconsin state court to differ from the King decision. Ultimately, Wisconsin taxpayers will pay the bill for the ensuing legal defense of this provision if passed.

It is important to remember also that Maryland v. King was a 5-4 decision, but not along traditional lines. Justice Scalia wrote the dissent, passionately attacking the majority's reasoning, and exposing the problems with warrantless collection of DNA upon arrest.

Justice Scalia wrote, and we should be mindful that, "this Act manages to burden uniquely the sole group for whom the Fourth Amendment's protections ought to be most jealously guarded: people who are innocent of the State's accusations. . . . I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection."

I appreciate your time and attention. Please feel free to contact me with any additional questions, concerns, or comments. Though we are in the eleventh hour of debate, there is time to avoid passing a flawed budget provision that is legally suspect.

Thank you.

Sincerely,

Evan Goyke
State Representative
18th Assembly District